

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 149

Docket No. CH-0752-06-0580-X-1

**George Bruton,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

August 4, 2009

George Bruton, Chicago, Illinois, pro se.

Paul E. Piwinski, Esquire, Hines, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board based on a recommendation of an administrative judge which found the agency in noncompliance with a final decision of the Merit Systems Protection Board (MSPB). In a June 12, 2009 opinion and order, the Board found that the agency remained in noncompliance and ordered the agency to provide specific evidence to demonstrate compliance. Thereafter, the agency submitted evidence showing that it is now in compliance with the final decision. Accordingly, we DISMISS the petition for enforcement as MOOT.

BACKGROUND

¶2 The appellant was employed as a WG-2 housekeeping aid at the agency's Edward Hines, Jr. Hospital when the agency removed him effective May 12, 2006, based on attendance-related misconduct. MSPB Docket No. CH-0752-06-0580-I-1, Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4g. The appellant appealed the removal to the Board's Central Regional Office. IAF, Tab 1. After the administrative judge affirmed the removal action, and the appellant filed a petition for review, the Board reversed the removal action in a July 3, 2008 opinion and order. *Bruton v. Department of Veteran's Affairs*, [109 M.S.P.R. 271](#), ¶ 12 (2008). The Board based its opinion and order on a decision of the Employees' Compensation Appeals Board that the appellant was entitled to compensation as a result of a work-related injury for the period he was charged with absence without leave by the agency. *Id.* In this decision, the agency was ordered to restore the appellant effective May 12, 2006. *Id.*, ¶ 14. The agency was also ordered, among other things, to pay the correct amount of back pay, interest on back pay, and other benefits under the regulations of the Office of Personnel Management (OPM). *Id.*, ¶ 15.

¶3 On August 11, 2008, the regional office received the appellant's petition for enforcement asserting that the agency had not restored him to his position nor given him the required back pay and associated benefits. MSPB Docket No. CH-0752-06-0580-C-1, Compliance File, Tab 1. After the parties made additional submissions, on September 16, 2008, the administrative judge issued a recommendation that the Board find the agency in noncompliance with the July 3, 2008 decision because the agency had not returned the appellant to work and had not provided him back pay and benefits. *Id.*, Tab 6. Because the administrative judge recommended that the Board find the agency in noncompliance, the matter was referred to the Board. *Id.* The parties made additional submissions regarding the compliance issues, and in a June 12, 2009 opinion and order, the Board found that the agency remained in noncompliance. *Bruton v. Department*

of *Veterans Affairs*, 2009 MSPB 110, ¶¶ 8-17 (June 12, 2009). The Board ordered the responsible agency official to appear before the MSPB General Counsel to show cause why sanctions should not be imposed. *Id.*, ¶ 21.

ANALYSIS

¶4 An agency bears the burden of proving its compliance with a Board order, and assertions of compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *See New v. Department of Veterans Affairs*, [106 M.S.P.R. 217](#), ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *Donovan v. U.S. Postal Service*, [101 M.S.P.R. 628](#), ¶¶ 6-7 (2006), *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). The appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions on continued noncompliance. *See New*, [106 M.S.P.R. 217](#), ¶ 6; *Donovan*, 101 M.S.P.R. 628, ¶ 7.

¶5 In response to the Board's June 12, 2009 decision, the agency has made additional submissions, which it maintains demonstrates compliance. The appellant has made his own submission. As discussed below, we find that the agency is in compliance.

The agency has submitted evidence showing that it properly canceled the May 12, 2006 removal action.

¶6 As stated above, the agency was ordered to restore the appellant to his WG-2 housekeeping aid position effective May 12, 2006. *Bruton*, [109 M.S.P.R. 271](#), ¶ 14. In the June 12, 2009 opinion and order, the Board found that the agency had failed to provide evidence showing that it has canceled the May 12, 2006 removal. The Board stated that, "[t]o be in compliance, the agency must provide evidence, such as an SF-50, showing that it has canceled the removal action effective May 12, 2006." The agency has now submitted an SF-50 reflecting a cancellation of the removal action effective May 12, 2006. MSPB Docket No.

CH-0752-06-0580-X-1, Compliance Referral File (CRF), Tab 19, Exhibit 1. Accordingly, the agency is now in compliance in this regard.

The agency has submitted evidence showing that it restored the appellant to his position of record and that there is a compelling reason for assigning the appellant different duties after his reinstatement.

¶7 Prior to his removal, the appellant was assigned to the Extended Care Center and performed light cleaning and desk duty for three hours a day. CRF, Tab 11 at 2, Tab 14 at 66. After his reinstatement, the agency assigned him to work in two different buildings without any explanation regarding the nature of the assignments or why the appellant was not returned to the Extended Care Center. In the June 12, 2009 opinion and order, the Board explained that where an agency has not reinstated an appellant to his former position and duties, the agency must have a strong overriding interest or compelling reasons for not doing so, and if compelling reasons exist, the agency must establish that the duties and responsibilities of the current position are substantially equivalent in scope and status to those of the position the employee held at the time of his removal. *Bruton*, 2009 MSPB 110, ¶¶ 9-12; *see Miller v. Department of the Army*, [109 M.S.P.R. 41](#), ¶ 11 (2008); *Walker v. Department of the Army*, [90 M.S.P.R. 136](#), ¶ 16 (2001); *Bullock v. Department of the Air Force*, [80 M.S.P.R. 361](#), ¶ 5 (1998). In its decision, the Board ordered the agency to “either restore the appellant to the position he held prior to his removal or show that it has a strong overriding interest or compelling reason for assigning the appellant to another position and that the position he has been assigned to is substantially similar to the former position.” *Bruton*, 2009 MPSB 110, ¶ 12.

¶8 The agency has now provided a June 19, 2009 affidavit from the Chief of the Environmental Management Services at the agency facility, Laurin De Vine, explaining that housekeeping aids, such as the appellant, work in various locations throughout the agency facility. CRF, Tab 19, Exhibit 3. De Vine explained that, prior to his removal, the appellant was not assigned a specific

desk but cleaned the reception area in the Extended Care Center. *Id.* Upon his reinstatement in 2008, the appellant presented medical documentation limiting him to three hours a day at a desk job and, as a result, the agency assigned him to a job answering telephones in the motor pool. *Id.*; *see* CRF, Tab 9 at 33. De Vine continued that, when the appellant complained about that position, the agency reassigned him to a ward in the hospital answering telephones. CRF, Tab 19, Exhibit 3. According to De Vine, on May 5, 2009, based on the appellant's request for a reassignment, the agency reassigned the appellant to answer telephones for a specific individual and then, effective June 24, 2009, assigned him to a position in the Extended Care Center within his medical restrictions. *Id.*; CRF, Tab 20 at 10 (June 24, 2009 Affidavit of De Vine); CRF, Tab 20, Exhibit 2 (June 23, 2009 memorandum from De Vine to the appellant). Other than to contend that he did not seek the May 5, 2009 reassignment, an allegation not supported by the record,¹ the appellant did not contest De Vine's assertions. *See* CRF, Tab 21 at 10.

¶9 Based on De Vine's affidavits, it is clear that a housekeeping aid position can involve assignments in various buildings at the agency facility. Because of the appellant's medical limitations, the agency could not assign him to the exact duties he performed prior to his removal, but all of his assignments have been consistent with his housekeeping aid position and his medical limitations. Accordingly, the agency has shown that it had a compelling reason for assigning the appellant different duties after his reinstatement, and that his assignments have been substantially equivalent in scope and status to the duties he performed prior to his removal. Thus, the agency has now shown compliance in this regard.

¹ The appellant submitted a May 4, 2009 note requesting a reassignment. CRF, Tab 21 at 14.

The agency has provided evidence that it has properly provided the appellant back pay and benefits.

¶10 In its July 3, 2008 decision in this matter, the Board ordered the agency to “pay the appellant the correct amount of back pay, interest on back pay, and other benefits.” *Bruton*, [109 M.S.P.R. 271](#), ¶ 14. The agency failed to provide adequate evidence of compliance in this area, and in the June 12, 2009 decision, the Board ordered, inter alia, that the agency “provide a detailed and clear explanation of the calculations it has made in determining the amount due the appellant.” *Id.*, ¶ 17.

¶11 The agency has now provided spreadsheets and supporting documentation, along with a detailed explanation, showing that it has properly calculated the gross amount of back pay and interest due the appellant. CRF, Tab 20 at 11-12, Exhibits A, B, C, G. The agency has also provided an explanation of the purpose and amount of all deductions and offsets, including offsets for Office of Personnel Management retirement payments, recovery of the lump sum payment for unused annual leave, and deductions for federal and state taxes, health insurance,² and retirement contributions. *Id.* at 11-12, Exhibits A. In addition, the agency has also provided documentation and a detailed explanation regarding the calculation and restoration of the appellant’s sick and annual leave balances. *Id.* at 11-12, Exhibits D, E, F. Finally, the agency has provided evidence that it sent by overnight delivery three checks totaling \$21,052.81 representing correct net amount due the appellant after all appropriate deductions and offsets. *Id.*, Exhibits 2, 3.

¶12 As stated above, after an agency provides relevant, material, and credible evidence of compliance, the appellant may rebut that evidence by making specific, nonconclusory, and supported allegations to the contrary. *See New*, [106](#)

² The record shows that the agency restored the appellant’s health insurance. CRF, Tab 19, Exhibit 2.

[M.S.P.R. 217](#), ¶ 6; *Donovan*, [101 M.S.P.R. 628](#), ¶ 7. Here, in a lengthy and somewhat difficult to understand submission, the appellant essentially alleges that he is entitled to benefits for eight hours a day and that the agency's calculations of the amounts due to him are erroneous.³ CRF, Tab 21 at 40, 43-45. The appellant also complains that none of the agency officials responsible for the delays in compliance have been punished. *Id.* at 4.

¶13 The record in this case shows that the appellant's medical restrictions limited his employment to three hours per day and that he has been approved to receive compensation from the Office of Workers' Compensation Programs (OWCP) based on those restrictions. CRF, Tab 9 at 33; IAF, Tab 6, Subtab 4e; MSPB Docket No. CH-0752-06-0580-I-1, Petition for Review File, Tab 1 at 12-18. As the Board held in the June 12, 2009 decision in this matter, "in determining the amount of back pay due the appellant, the agency may consider the compensation he has received from [OWCP]." *Bruton*, 2009 MSPB 110, ¶ 17 n.1; see *White v. U.S. Postal Service*, [110 M.S.P.R. 461](#), ¶ 10 (2009) (stating that an appellant is not entitled to back pay for the period he was receiving OWCP benefits); *Special Counsel ex rel. Steen v. Department of Veterans Affairs*, [81 M.S.P.R. 601](#), ¶ 9 (1999) (stating that the employee was only entitled to the back pay he would have received beyond the OWCP payments he already received). Thus, the appellant's claim of noncompliance is without merit.

¶14 Regarding the appellant's claim that the agency's calculation of the amount due to him is erroneous, we have reviewed the spreadsheets and accompanying explanation provided by the agency, and we discern no error. The appellant does not provide any specifics to support his conclusory allegation and, thus, we find the agency in compliance. Finally, regarding the appellant's complaint that none of the agency officials responsible for the delay in compliance have been

³ The appellant apparently returned the three checks the agency sent to him. CRF, Tab 21 at 40-41; Tab 22. Because the record shows that the agency sent the appellant payment for the correct amount due him, the appellant's action does not place the agency in noncompliance.

punished, the Board lacks the authority to impose punishment or sanctions once compliance has been obtained. *See Evans v. U.S. Postal Service*, [110 M.S.P.R. 58](#), ¶ 14 (2008); *Alexander v. U.S. Postal Service*, [86 M.S.P.R. 434](#), ¶ 10 (2000).

ORDER

¶15 Because the agency has complied with the Board's final order in this matter, the petition for enforcement is DISMISSED AS MOOT, and the Board's June 12, 2009 order for the responsible agency official, Nathan L. Geraths, to appear before the General Counsel of the MSPB to show cause why sanctions should not be imposed is VACATED.

¶16 This is the final decision of the Merit Systems Protection Board in this compliance matter. Title 5 of the Code of Federal Regulations, section 1201.183(b).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.